TRADITIONALIST RELIGIOUS AND CULTURAL CHALLENGERS - INTERNATIONAL AND CONSTITUTIONAL HUMAN RIGHTS RESPONSES

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The legal regime of human rights entitles individuals and groups to legal protection against the hegemony of the political majority, of the religious establishment and of other powerful social actors. This Article examines the way in which this protection is implemented at the constitutional and international levels. Within states, it is at the constitutional level that the supremacy of human rights is translated into a normative paradigm. However, within states there may be opposition to the human rights regime—pragmatic or ideological—from powerful lobbies: majoritarian or sectoral. This opposition may result in lack of political will to apply or enforce human rights through constitutional mechanisms. The author shows that, in contrast, the formulation of the human rights vision at the international level consistently underwrites the human rights of individuals and groups as against the power of traditionalist religious or cultural norms. She suggests that the future of human rights as a universal paradigm depends on the effectiveness with which international norms can be translated to the constitutional level thus suggesting a reversal of the previously observed process of translating from the constitutional to the regional.

I. Introduction

The supremacy of the human rights regime—international and constitutional—is both in the ascendant and in crisis. The centrality of the human rights discourse and the growth of agencies which are intended to enforce human rights have placed this regime at the center of legal thinking since the 1960s. However, the regime is
challenged both pragmatically and ideologically. This polarity creates a crisis at both the international and constitutional level. It is often assumed that failure to enforce human rights is for pragmatic reasons and is merely a result of lack of will or inability to live up to and enforce required standards. Examples include genocides in Ruanda and Darfur, the holding of political prisoners in China, Islamic totalitarianism from Iran to Saudi Arabia, Syrian political assassinations in Lebanon, ongoing Israeli occupation of parts of the Palestinian entity, mass rape in Bosnia and the Congo and the list can go on and on. These violations of human rights represent delinquencies and not ideological rejection.

It is less commonly appreciated that the very concept of human rights is challenged by mainstream ideologies. Unlike the failure to enforce human rights, these ideologies threaten the very paradigm which lies at the heart of human rights. There are current manifestations of ideological dissonance between human rights standards from the perspective of orthodox religious beliefs and traditionalist cultures. There is a confrontational stance to human rights of orthodox religious institutions in most regions of the world, variously opposing the political and civil rights of women, homosexuals, Dalits, heretics and non-believers and not accepting the norms of equality and freedom of conscience or expression, where these conflict with their norms, customs or sensitivities. There is an immediate and pressing constitutional problem in Israel, where deference to the religious lobby has secured the exclusion of the rights to equality, freedom of conscience and expression and freedom of religion from full constitutional recognition.

I concentrate in this Paper on the way international and the constitutional human rights regimes respond to ideological rejection of the human rights paradigm by religious orthodoxy or cultural traditionalism. I confine my remarks to orthodox religion and traditionalist cultures advisedly. Religious reform and reconstructionist movements that have adopted human rights standards are clearly not a challenge to the human rights vision but rather a support for it. Thus, I discuss those contemporary institutions of religion (orthodox religion) and culture (traditionalist culture) that have not adopted human rights criteria but, rather, oppose them. There are two main contexts in which the claim for deference to cultural or religious norms challenges the human rights paradigm in constitutional democracies. The first is in the context of deference to religious values of the majority\(^1\) and the second relates to the demand for

\(^1\) There is a wide spectrum of arrangements from full fledged theocratic government to religious symbolism in the signata of national identity.
normative pluralism, with demands for internal community autonomy for dissident
groups, particularly religious and cultural groups.²

II. Normative Regulation of the Clash

A. International Treaties

At the international level, the right to freedom of religion or belief, including its
manifestation individually or in community with others and the right of ethnic,
religious, and linguistic minorities to enjoy their culture are guaranteed. In the
constitutions of almost all democracies too, these rights are guaranteed. Hence it is
sometimes argued that religious or cultural values are themselves entitled to human
rights protection on the very same level as the rights to equality and freedom of
conscience or expression, which these values may deny. However, I argue that the
international treaty regulation establishes a hierarchy in which the rights to equality
and to freedom of expression or conscience take precedence over the right to manifest
one’s religion or to enjoy one’s culture.

The clash between culture and religion, on the one hand, and human rights, on the
other, is expressly regulated in two international conventions, ICCPR³ and CEDAW.⁴
Of the two, CEDAW provides a more specific hierarchy of rights.

Article 5(a) of CEDAW requires States Parties to take all appropriate measures:

To modify the social and cultural patterns of conduct of men and
women, with a view to achieving the elimination of prejudices and

² Jack T. Levy, Classifying Cultural Rights, in ETHNICITY AND GROUP RIGHTS 39 (Ian Shapiro & Will
Kymlicka eds., 1997).
³ International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18(3), G.A. Res. 2200A
entered into force Mar. 23, 1976 [hereinafter ICCPR].
⁴ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, art.
customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

This article imposes a positive obligation on states parties to “modify ... social and cultural” practices in the case of a clash. Additionally, Article 2(f) imposes an obligation to “modify or abolish ... customs and practices” that discriminate against women. Culture is a macro-concept, definitive of human society, and the concept of “cultural practices” thus subsumes the religious norms of societies. Custom is the way in which the traditionalist cultural norms are sustained in a society. It seems clear, then, that Article 5(a) and Article 2(f) give superior force to the right to gender equality in the case of a clash with cultural practices or customs, including religious norms, thus creating a clear hierarchy of values.

In using the construct of culture—the overarching concept under which religion is included—in creating a clear hierarchical deference to women’s human rights under CEDAW, a wide range of protection appears to have been secured. The use of the term “culture” is a less contentious term than religion in the context of women’s right to equality and appears to have produced a greater readiness by states to subscribe to the principle of Article 5(a) without reservations. While there are at least twenty reservations by state parties that clearly indicate that the state party wishes to retain religious norms for either its entire population or for minority communities, most of which have been made under Article 16 of the convention, dealing with women’s rights to equality within the family, and a few of which have been made regarding the entire convention, yet only four countries have entered an express reservation to Article 5(a). This probably indicates that states parties may not have been fully aware of the incorporation of religion within culture. However, in international forums, cultural practices have, as is appropriate in the view of this writer, been taken to include religious norms. In its concluding comments, the CEDAW Committee has recommended that states parties enact laws making illegal cultural practices discriminatory against women or enforce existing laws aimed at ending such practices. These cultural practices have included religious practices that are prejudicial to women. The committee not only held that the typical concept of “the cultural,” in this context, such as the practice of female genital mutilation, is a violation of the convention. It has also consistently expressed its concern about the continuing authorization of polygamy, whether or not based on religious belief, and has asked governments to take measures to prevent its practice.
In ICCPR’s Article 18(3), there is express regulation of any potential conflict between the right to manifest one’s religion and the fundamental rights or freedoms of others. The article provides that “[t]he right to manifest one’s religion or beliefs ... may be subject only to such limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.” Article 18(3) thus provides an exception to the right to the freedom to manifest one’s religion, should a confrontation materialize with the fundamental rights and freedoms of others, including the rights to equality, freedom of conscience and freedom of expression. Through this exception, a hierarchy of rights is implicitly introduced, albeit in less categorical language than in CEDAW. Indeed, the article, in providing an exception for such limitations as may be “necessary” to protect fundamental rights, may be read to imply that there will be an obligation on states parties to impose them. This seems to be the reading implicit in the Human Rights Committee’s General Comment on the Equality of Rights between Men and Women, which, although not expressly referring to Article 18(3), holds that the right to religion does not allow any state, group, or person to violate women’s equality rights. Article 18(3) also protects the fundamental rights of “others,” and this could have been read to exclude protection of members of the religion themselves. However, the Human Rights Committee seems to have adopted a more liberal approach to the interpretation of the clause, for instance condemning polygamy, even though it is a religious practice of the members of the religion. Further support for the view that there is an implicit hierarchy of rights in the ICCPR can be further garnered from the provisions on the right to freedom of expression: while the limits on the exercise of the right include preventing hate speech and protecting the reputation of others or preservation of the public order, they do not limit the right in order to protect religious values or sensitivities.

The Article 27 provisions of the ICCPR, with regard to the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language, do not explicitly anticipate a clash with other human rights. However, the Human Rights Committee has clarified that where a clash does occur, as it does in the case of women’s rights, it is the right to equality which prevails:

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6 *Id.* ¶ 24.
Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights... The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

So, like the CEDAW Committee, the Human Rights Committee has rejected the cultural defence and the claim of religious freedom as justifications for discrimination against women and, by implication, as justification for the violation of other human rights.

CEDAW and the ICCPR thus balance the right to religious manifestation and the right to enjoy one’s culture with human rights and women’s rights, giving priority to these latter where there is a clash. While both conventions recognize the need for balancing, there are significant differences between their formulations. First, the conception of a mandatory hierarchy of values in Article 5(a) of CEDAW is not matched by a similar edict in Article 18(3). Indeed, Article 18(3) provides an exception to a human rights standard and, as such, the Human Rights Committee has said it must be strictly interpreted. Nevertheless, the committees of experts under both conventions have required states parties to put an end to religious practices which violate human rights. Second, regulation of the clash with human rights relates to culture, in CEDAW, while it relates to religion and culture, separately addressed, in ICCPR. Nevertheless, culture has been applied as incorporating religion by the CEDAW committee. Third, there is a difference in wording as regards the protected parties; in CEDAW, the reference is to “men and women,” while in ICCPR it is to “others.” The obvious reference in CEDAW is to all men and women, whether within the culture or outside it; in ICCPR, the primary reference may be to those outside the religion; however, as pointed out, the Human Rights Committee has not adopted such a restrictive approach. The interwoven nature of culture and religion, insofar as they affect women’s rights, has resulted in a merging of the two by international agencies or bodies involved with the application and enforcement of the human rights treaties and have required states to protect human rights against violations based on religious
or cultural norms. It is in this spirit that the committees of experts, charged with monitoring compliance by the states parties to the two treaties, have applied Article 5(a) and Article 18(3).

B. Politics of Constitutional Adjudication

At the constitutional level, no express hierarchy such as that as is to be found in international treaties has been articulated. There may be some indication of a hierarchy of rights in that in some of the constitutions of Western democracies the right to equality is one of the few rights declared in absolute terms. On this basis, the potential for establishing such a hierarchy of rights seems to be conceivable. Furthermore, even without the express determination of the primacy of equality and freedom of conscience over the right to manifestation of religion or enjoyment of culture, there is a mode of interpretation which regards the right to religious expression as private and not extending to the exercise of power or rights over others. By this interpretation, the constitutional realm will occupy the public space, guaranteeing pluralistic equality and with it a space for the manifestation of religion in a way that does not violate human rights. Later in this Article, I discuss the theoretical foundations of this interpretation.

It is in the courts that the constitutional struggle between traditionalist religious or cultural values and human rights has been waged. I have analyzed a sample of constitutional cases in which the cultural defense and the right to religious freedom have been raised in opposition to women’s and homosexuals’ claims to gender equality in constitutional courts and international tribunals. Traditionalist religions and cultures are bastions of patriarchal authority as regards a wide range of issues in both the public and the private or domestic sphere and there is a considerable body of constitutional case law of the clash with women’s and homosexuals’ human rights. My purpose was to compare the rhetoric and the outcome of the judgments in order to extrapolate some empirical data as to the readiness of constitutional courts to apply rights in the hierarchical fashion required by the international treaties. Using this sample of cases requires a caveat: the gender issue may not turn out to be representative of constitutional courts’ attitudes to other areas in which religion and human rights clash,

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such as freedom of conscience or expression, as it may be informed partly by gender bias in the judicial system. Even should this be the case, in view of the centrality of the gender issue and the clarity of the primacy of women’s right to equality in international law, the gender sample will remain relevant.

1. Patriarchal Regulation of Membership and Property by Traditionalist Tribes

In three out of four constitutional cases, deference has been given to tribal sovereignty as regards the allocation of property rights although the rules of allocation denied women equal rights to tribal membership and property. The courts of U.S., Canada and Zimbabwe rejected the women’s equality claims and it was only the Tanzanian High Court which, relying on the constitution and CEDAW held that it is essential that women live on terms of full equality with men.

There have been two similarly decided North American cases on discrimination against women regarding their right to membership in tribal minorities. In the Canadian Supreme Court, in 1974, Jeanette Lavell lost her challenge to invalidate Canada’s Indian Act. The Indian Act provided that, unlike a Native man, a Native woman who married a non-Native lost her status as an Indian, as did her children. In 1985, in the aftermath of a decision of the Human Rights Committee, discussed below, and subsequent to the enactment of the Canadian Charter of Rights and Fundamental Freedoms, the Indian Act was amended and the statutory discrimination against women eliminated. In the United States Martinez case, in 1978, the Supreme Court refused to intervene to invalidate a Santa Clara Pueblo Ordinance that imposed

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10 Joyce Green, *Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government*, 4 Const. Forum 110 (1993). This constituted one of the issues of gender equality in a later constitutional struggle over the drafting of the Canadian Charter. The established male leadership contended that the Charter should not apply to Indian governments because it would undermine their inherent right to self-government and place an emphasis on individual fights not in keeping with traditional Native values. In contrast, the NWAC, the Native Women’s Association of Canada, fought for the applicability of the Charter in order to protect themselves against patriarchal dominance. Joyce Green highlights the problem of the silenced voice within autonomous subcultures: “Native women identify a shared experience of oppression as women within the Native community, together with (instead of only as) the experience of colonial oppression as Aboriginals within the dominant society.” She concludes: “[u]ltimately the process excluded women qua women.”
similar discriminatory membership rules for tribal members. Judith Resnik offers an explanation of the decision, namely, “that membership rules that subordinate women do not threaten federal norms (either because federal law tolerates women holding lesser status than men or because federal law has labeled the issue one of ‘private’ ordering and non-normative).”

Two African court decisions on discrimination against women in their land rights under traditional customary law were decided in diametrically opposed ways. In the Pastory case in 1992, the Tanzanian High Court held that the law of customary inheritance, which barred women, unlike their male counterparts, from selling clan land, unconstitutionally discriminated against women. In invalidating the rule of customary law, Justice Mwalusanya relied on the language of Tanzania’s Constitutional Bill of Rights and the ratification of CEDAW. Quoting Julius Nyerere’s call for socialist equality—“If we want our country to make full and quick progress now, it is essential that our women live on terms of full equality with men,”—he observed: “From now on females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land ... is concerned. It is part of the long road to women’s liberation.” In 1999, a similar issue arose in Zimbabwe in the Magaya case. Venia Magaya, the daughter of her deceased father’s first wife, claimed ownership of the estate; this was opposed by a son of the father’s second wife. The Supreme Court—relying on an exemption for customary law under the Constitution and rejecting the binding effect of the international human rights instruments to which Zimbabwe was—party-refused to invalidate a customary law rule that gave preference to males in inheritance. Judge Muchechetere held that this customary law rule was part of the fabric of the African socio-political order, at the heart of which lies the family. He said:

At the head of the family there was a patriarch, or a senior man, who exercised control of the property and lives of women and juniors.

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11 Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Under the tribe’s rules, the children of female members who married outside the tribe could not retain their membership in the tribe, while the children of male members who married outside the tribe would remain members.
14 Id. at 770.
It is from this that the status of women is derived. The woman’s status is therefore basically the same as that of any junior male in the family.\textsuperscript{16}

He added:

Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration. I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts.\textsuperscript{17}

2. Polygamy, Bigamy and Divorce Rights

The approach of constitutional courts to marital status issues has varied as between jurisdictions. The United States and Canada have upheld women’s right to equality in marital status, with the U.S. Supreme Court\textsuperscript{18} upholding prohibitions of Mormon polygamy and the Canadian Supreme Court\textsuperscript{19} enforcing a Jewish husband’s pre-arranged agreement to give a Jewish divorce. These North American decisions imposed constitutional rights to equality on the women of minority religions which have little potential for exerting pressure on the political system and take a quite different track to the decisions on tribal membership discussed above. In India, the Supreme Court refused to strike down the Moslem practice of polygamy for the large and politically active Moslem minority but refused to extend the right to polygamy to Hindu men who had converted to Islam. The Israeli Supreme Court has rigidly refrained from interfering in statutory provisions which empower the courts of the religious communities to determine the marital status of members of the three communities in Israel—Jewish, Moslem and Christian—even where the Court has acknowledged their violation of women’s human rights. The acquiescence of the

\textsuperscript{16} Id. at 10
\textsuperscript{17} Id. at 17-18
\textsuperscript{18} Reynolds v. United States, 98 U.S. 145 (1878).
\textsuperscript{19} Bruker v. Marcovitz, [2007] S.C.C. 54
Court is in the context of a powerful Orthodox Jewish political lobby which succeeds in keeping the religious legislation in place.

In a series of cases, starting in 1879, the United States Supreme Court held that the free exercise clause did not protect polygamy from criminal sanction. The decisions related to the Mormons, a minority sect of Christianity, which is the religion of the majority. In *Reynolds*, the U.S. Supreme Court upheld a prohibition of the Mormon practice of polygamy.\(^{20}\) In *Davis v. Beason*, in 1890, Justice Field said: “Bigamy and polygamy are crimes by the laws of all civilized and Christian countries... They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women, and to debase man.”\(^{21}\) As a constitutional matter, he held that, “[w]hile legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as ‘religion.’”\(^{22}\) In 1946, in *Cleveland*, the majority opinion, delivered by Justice Douglas, held that the transportation of women across state lines for the purpose of polygamous cohabitation was “an immoral purpose” under the statutory language and, hence, a criminal offense.\(^{23}\) Citing *Reynolds*, the Court ruled: “it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy.”\(^{24}\) In his dissent, Justice Murphy introduced a note of doubt. He said:

> It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is, as well as what it is not ... Historically its use has far exceeded that of any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today, it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears ... There is

\(^{20}\) *Reynolds v. United States*, *supra* note 18.

\(^{21}\) *Davis v. Beason*, 133 U.S. 333, 341 (1890).

\(^{22}\) *Id.* at 345.

\(^{23}\) *Cleveland v. United States*, 329 U.S. 14 (1946).

\(^{24}\) *Id.* at 20.
thus no basis in fact for including polygyny within the phrase ‘any other immoral purpose’ [along with prostitution and debauchery].\(^{25}\)

In 2007, the Canadian Supreme Court upheld the enforceability of a Jewish husband’s agreement, which had been made in the course of proceedings for a civil divorce, to appear before the rabbinical authorities to obtain a Jewish divorce, or get, immediately upon the granting of the divorce.\(^{26}\) A wife cannot obtain a get unless her husband agrees to give it. Without one, she remains his wife and is unable to remarry under Jewish law. In this case, despite the wife’s repeated requests, in breach of the agreement, the husband consistently refused to provide a get for 15 years, and the wife sued for damages. The husband argued that his agreement to give a get was not valid under Quebec law and that he was protected by his right to freedom of religion from having to pay damages for its breach. The Supreme Court held the agreement enforceable. In its judgment, the Court took note of the gender discrimination the religious barriers to remarriage may represent and held that enforcement of agreements to release the wife harmonizes with Canada’s approach to equality rights, to divorce and remarriage and to religious freedom.

In 1995, in Sarla Mudgal, the Indian Supreme Court decided, in the case of a man who was married in a monogamous Hindu marriage, under the Hindu Marriage Act, and who converted to Islam, only to remarry without dissolving the first marriage, that the second marriage was prohibited.\(^{27}\) The Court refused to recognize the second marriage as a polygamous marriage under the Muslim law. The Court, pointing out that polygamy had been held injurious to public morals in the U.S., said: “in the Indian Republic, there is to be only one Nation—the Indian Nation and no community can claim to be a separate entity on the basis of religion.”\(^{28}\) In 1997, the Indian Supreme Court handed down a more ambivalent decision on polygamy. In Ahmedabad Women Action Group, the Court dismissed constitutional challenges by a women’s NGO to the Muslim practices of polygamy and triple talaq (a form of summary unilateral divorce by the husband) and to provisions of the Hindu Succession Act that discriminated

\(^{25}\) *Id.* at 25-27.


against women. The Court used very different rhetoric from that used only two years earlier: “a uniform law, though highly desirable, may be counter-productive to the unity and integrity of the nation” and “polygamy is recognised as a valid institution when a Muslim male marries more than one wife.”

Israel’s High Court of Justice, in 1971, in the Boronovski case, rejected a woman’s claim to cancel the rabbinical license, issued in accordance with Jewish law, allowing her husband to remarry without her agreement to give him a get. The woman petitioner had claimed discrimination on grounds of gender, since women are not symmetrically entitled to a similar rabbinical license in case of refusal of a get by their husbands. The majority decision rejected the petitioner’s claim and, although expressly recognizing the injustice to women and expressing regret, refused to find unjustifiable discrimination. Justice Haim Cohen, in a minority opinion accepting the claim, concluded that there were no differences between men and women that could justify the difference in treatment. In Rephaeli, in 1997, a woman petitioned to overturn the refusal of the Grand Rabbinical Court to oblige her husband, separated from her for more than six years, to give her a divorce. The High Court of Justice ruled unanimously to dismiss, holding that it could not intervene in the Grand Rabbinical Court’s decision. Justice Cheshin, although concurring in the ruling, remarked that, under Jewish law, the situation of a slave was preferable to that of a wife since even a slave would have been released after seven years of bondage.

3. Matrimonial Property and Maintenance

In both India and Israel, the Supreme Courts have attempted to insist on women’s right to equality in the division of matrimonial property where the division is being determined by religious authorities. In both countries the civil law provisions have

30 Id. at 577.
32 Id. at 18. It is interesting to note that the Court’s validation of the legislation results in a situation of greater equality, on the issue of men’s multiple marriages for Muslims and Christians than for Jewish women.
34 Id. at 213. Nevertheless, despite this powerful rhetoric, Justice Cheshin, like the other judges, did not find a way to intervene.
introduced egalitarian matrimonial property and maintenance laws but, in both, there are religious sub-systems which apply religious law to these issues—in India, Moslem and Christian minority sub-systems and in Israel the Jewish Orthodox minority in a Jewish majority. In both countries the judicial rulings have failed to effect social change.

In India, with its Hindu majority, the clash between religion and women’s right to equality has been examined in relation to the two minority religions (Islam and Christianity). For Hindu women, India follows a system in which personal status laws are determined by the law of the religion of the parties involved but are applied in civil courts. Many of the problems of inequality in Hindu family law were removed by the Hindu Marriage Act.35

In the 1985 Shah Bano Begum case, the Indian Supreme Court confirmed a maintenance award for a divorced Muslim woman, allegedly contrary to Shari’a law.36 The Court was composed of five Hindu judges and the case was decided unanimously. On the question of the religious claims underlying opposition to the maintenance award, Chief Justice Chandrachud was, on the one hand, scathing about the inequality wrought by the Muslim personal code:

Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together?37

The Court also found Islamic authority in verses 241 and 242 of the Qur’an for the proposition that there is an obligation to pay maintenance to divorced wives who

35 The Hindu Marriage Act, No. 25 of 1955; India Code v.6.
37 Id. at 559.
are unable to maintain themselves.\textsuperscript{38} The ratio of the case was, however, based on the Code of Criminal Procedure, under which a maintenance obligation may be imposed on a person who neglects or refuses to pay maintenance to a wife who is unable to maintain herself. In the aftermath of the \textit{Shah Bano} judgment, the statutory Muslim Personal Law Board campaigned to reverse the ruling. It succeeded on all fronts. The ruling Congress Party introduced legislation to reverse the judgment,\textsuperscript{39} and the petitioner waived all her rights under the Supreme Court judgment.

In the \textit{Mary Roy} case, in 1986, the Indian Supreme Court considered the constitutionality of the unequal inheritance provisions in the Christian Succession Act of 1916.\textsuperscript{40} The petitioner, a Christian woman resident in Kerala, had claimed that the act infringed women’s right to equality in that it provided for a lower inheritance share for women. The Supreme Court avoided the issue of constitutionality, holding that the Indian Succession Act of 1925, which grants equal inheritance rights to men and women, governed Christians in Kerala. According to Martha Nussbaum, the Synod of Christian Churches has supported opposition by the Christian community to the Mary Roy decision and has financed the drafting of wills to disinherit female heirs.\textsuperscript{41}

In Israel, the \textit{Bavli} case, in 1994, involved the division of matrimonial property.\textsuperscript{42} Jurisdiction for determining the division of matrimonial property is sometimes under

\textsuperscript{38} \textit{Cf.} Abu Bakar Siddique v. S. M. A. Bakkar, 38 D.L.R. (AD) (1986). In Bangladesh, in 1986, the High Court ruled on a petition by a mother to retain custody of her son after the age of seven. The Court held that although the principles of Islamic law allowed the woman to be guardian of a male child only until the age of seven, a deviation from this rule would be possible where the child’s welfare required it. According to the judge, there was no authoritative ruling on this issue in the Qur’an or the Sunnah, and hence he was within the principles of Islamic law in awarding custody to the mother in this unusual case, where the child was afflicted with a rare disease and the mother, a doctor, was able to take care of his treatment. In that case, the Court was ruling on a Muslim issue in a Muslim state and the decision does not appear to have been opposed by public opinion.

\textsuperscript{39} The Muslim Women’s [Protection of Rights on Divorce] Act, 1986. However, High Courts have interpreted the Act’s provision for “a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband” to mean that a woman is entitled to during her iddat period very broadly to include amounts worth lakhs (hundreds of thousands) of rupees.


\textsuperscript{41} \textit{Martha Nussbaum, Sex and Social Justice} 98 (1999). \textit{See also} Marc Galanter & Jayanth Krishnan, \textit{Personal Law and Human Rights in India and Israel}, 34 Isr. L. Rev. 101 (2000). According to Galanter and Krishnan, the rejection of the decision by the Christian minority group demonstrates concern about losing their identity if they do not keep the established personal law.

\textsuperscript{42} HCJ 1000/92 Bavli v. Rabbinical Court of Appeals [1994] IsrSC 48(2) 221.
the rabbinical courts and sometimes the civil courts: Jurisdiction is vested in the rabbinical courts either where both partners to the marriage agree to it or where one of the partners (usually the husband) has reached the rabbinical court with a request for a divorce and a request to include adjudication of the property issues, before the other partner has brought action in a civil court. Different regimes regarding the division of matrimonial property are applied in the two jurisdictions; in the rabbinical courts, the Jewish law regime of property separation is applied, and, in the civil courts, there is both a judicial and statutory presumption of community property, which is to be divided equally between the spouses on dissolution of the marriage. In the case in hand, the rabbinical courts had jurisdiction and refused to divide the matrimonial property equally. The divorced wife’s petition to the High Court of Justice was accepted and the case returned to the rabbinical courts. Justice Barak, the president of the High Court, rejected the claim that the Jewish law regime of separate matrimonial property could not be considered discriminatory as it applied to men and women equally, holding that the social facts showed women are disadvantaged where a separate property regime is applied. Following this decision, there were vociferous protests from Orthodox Jewish groups, and it is common knowledge that the rabbinical courts do not apply the ruling by the High Court of Justice.

4. Religious Ritual and Dress in the Public Arena

Two contrary trends regarding women’s human rights as religious women have been brought before constitutional courts. There are those women who regard themselves as religious feminists who, rejecting the patriarchal norms of their religions, have demanded full and equal religious personhood. This includes Lutheran and Protestant women who have sought admission to the priesthood and it includes Orthodox Jewish women who have sought equality in the rituals of worship, as practiced in the public arena. In the only constitutional case brought on this issue, the Israeli Supreme Court ultimately refused the women’s claim to equality in ritual. In a different trend, there are Moslem women who are asserting the right to conform to evidently patriarchal religious norms and express this through the demand to wear various forms of the Moslem head scarf in public and private institutions. These claims have produced
a mass of constitutional and labor court decisions in Europe, where the Moslems are minority communities and in Turkey, where traditionalist religious Moslems are regarded as a minority in a secular constitutional state. The overall trend seems to be to recognize adult religious women’s right to wear the veil, except where there are dress codes to which all members of an institution must adhere. However, the Courts have been more circumspect as regards the wearing of Moslem female apparel in educational institutions, regarding this as contrary either to state secularism or to gender equality.

In a series of three decisions between 1994 to 2004, Israel’s High Court of Justice rejected the petition of the Women of the Wall (WOW) to pray at the Kotel (the Western Wall of the second Temple and a central national, cultural, and religious site for Jews) in a group, wearing prayer shawls and reading aloud from the Torah Scroll, a manner of prayer customary for men but not for women and a subject of much controversy among Orthodox Jewish authorities.\(^{44}\) The women’s prayer in this manner had been greeted with violent opposition from other Orthodox worshippers and prohibited by the secular authorities. In the first of the decisions, the Court recommended that the government find a way to enforce the WOW’s right to freedom of worship while minimizing the injury to the sensitivities of worshippers.\(^{45}\) In the second decision, the Court, composed of two women justices and one man, directed the government to implement the WOW’s prayer rights at the Kotel within six months.\(^{46}\) Orthodox Jewish political parties immediately presented a bill to convert the area in front of the Kotel into a religious shrine exclusively for Orthodox religious practice with a penalty of seven years’ imprisonment for any person violating the current Orthodox custom of prayer. The attorney general requested a further hearing and the president of the Supreme Court appointed an expanded panel of nine justices to reconsider the issue. The Court held by a majority of nine to two that the members of WOW were entitled to pray in their manner at the Kotel; however, it also decided, by a majority of five to four, that, in order to prevent injury to the sensitivities of other worshippers, the government should make arrangements for a suitable prayer area for WOW at an adjacent site (Robinson’s Arch)—an alternative to which the WOW were totally opposed—and only if the government failed to do so within a year would the WOW

\(^{44}\) HCJ 257/89 Anat Hoffman v. Commissioner of the Western Wall [1994] IsrSC 48(2) 265.

\(^{45}\) Id. at 356.

\(^{46}\) HCJ 3358/95 Anat Hoffman v. Director General of Prime Minister’s Office [2000] IsrSC 54(2) 345. The author acted as counsel for the WOW.
have the right to pray at the Kotel. The government constructed a prayer area at Robinson’s Arch at which the WOW do not pray.

There has been a series of cases, in Europe and in Turkey, on the wearing of Muslim head scarves—the hijab—in educational institutions or workplaces. The most rigid dress code has been the burkah (head-to-toe covering, with a veiled window for seeing through) or the veil (head-to-toe covering with an open slit for the eyes) and, in less extreme forms, the hijab (headscarf tied under the chin). In constitutional democracies, the issue is represented as a clash between the right of the religious women themselves to freedom of religion and expression, on one hand, and the right to gender equality or to the freedom to express secular values, on the other.

In 1989, the Constitutional Court in Turkey held unconstitutional a bylaw of the Institutions of Higher Education that, as an exception to the requirement of “modern clothing” in universities, allowed the neck and hair to be veiled by a head scarf because of religious belief. The Court held that the bylaw undermined the secular character of the state, was inconsistent with the law requiring civil servants to have their heads unveiled, and was invalid. This decision thus obliged the universities to ban the wearing of Muslim head scarves. In 2008, the Islamic AKP which is the ruling party in Turkey reversed the ban. The French courts have wavered on the issue of Muslim head scarves. In 1989, the Conseil d’Etat ruled that “the ostentatious wearing” of head scarves at state schools violated a law prohibiting proselytizing in the schools. This decision was followed by unfavorable media attention to the wearing of the hijab, and, in 1994, the Ministry of Education issued a directive prohibiting the wearing of “ostentatious political and religious symbols” in state schools. In 1995, however, the Conseil d’Etat held that the simple wearing of a Muslim head scarf does not provide grounds for exclusion from school. This was settled by the legislature

47 HCJ 4128/00 Director General of Prime Minister’s Office v. Anat Hoffman [2003] IsrSC 57(3) 289. The author acted as counsel for the WOW. For a full discussion, see Frances Raday, Claiming Equal Religious Personhood: Women of the Wall’s Constitutional Saga, in Religion in the Public Sphere, A Comparative Analysis of German, Israeli, American and International Law 255 (Winfried Brugger & Michael Karayanni eds., 2007).
48 Constitutional Court of Turkey, Decision 1989/652.
51 Id.
in 2004 in a law which upheld secularity of French state schools and prohibited the wearing of conspicuous religious symbols by students or teachers.

In 1999, in Switzerland, the Geneva Conseil d’Etat dismissed a teacher’s challenge to a ban imposed by the Educational Department on Muslim teachers wearing headscarves in the public, secular education system. That judgment was upheld by the federal court, which, noting that the applicant’s job made her a representative of the state, held that the head scarf constituted a strong vestmental sign of belief in a particular religion and that the restriction imposed by the education authorities was accordingly necessary to preserve both the principle of neutrality between different faiths and that of equality between the sexes within the school.52 In 2003, Germany’s Federal Constitutional Court ruled that Muslims could wear their veils while teaching but at the same time encouraged new laws to ban religious symbols.53 Subsequently, eight of 16 German states passed school laws that banned headscarves, saying they were an affront to Christian values.

The House of Lords adopted a contextualized approach in the Denbigh High School case in 2006.54 They rejected a Muslim student’s petition to be allowed to wear a jilbab to a school which had made provision for tunics and trousers acceptable to the local Muslim community. The opinion in the Court was divided between those judges who held that the school’s refusal to allow Shabina Begum to wear a jilbab at school did not interfere with her Article 9 right under the European Convention of Human Rights to manifest her religion and those who restricted themselves to holding that, even if it did, the school’s decision was objectively justified. The majority of the judges thought it proper that schools should be called upon to explain and justify their decisions, as did the Denbigh High School in the specific context. Baroness Hale of Richmond was the only one of the judges to analyze the equality implications of the wearing of the veil.

Strict dress codes may be imposed upon women, not for their own sake but to serve the ends of others. Hence they may be denied equal freedom to choose for

themselves. They may also be denied equal treatment. A dress code which requires women to conceal all but their face and hands, while leaving men much freer to decide what they will wear, does not treat them equally.\textsuperscript{55}

Baroness Hale went on to explain that while adult women may choose the veil, schools are different.

Their task is to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential. In deciding how far to go in accommodating religious requirements within its dress code, such a school has to accommodate some complex considerations. These are helpfully explained by Professor Frances Raday in “Culture, Religion and Gender” \textsuperscript{[2003]} 1 International Journal of Constitutional Law 663, 689:

“genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions. A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also, for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women’s and girls’ rights to equality and freedom . . . On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions. In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends upon the balance between these two conflicting policy priorities in a specific social environment.”\textsuperscript{56}

\textsuperscript{55} Id. at 38, ¶ 95.

\textsuperscript{56} Frances Raday, \textit{Culture, Religion and Gender}, 1 INT’L. J. CONST. L. 663, 709 (2003).
It seems to me that that was exactly what this school was trying to do when it devised the school uniform policy to suit the social conditions in that school, in that town, and at that time.

The workplace issue arose in 2000, in a Danish court, in the context of a Muslim girl’s demand to wear the Muslim head scarf at work. The Court held that, because the workplace did not have a general dress code, it could not forbid the girl to wear the head scarf. Kirsten Ketscher comments: “Regrettably the question of the girl’s rights in relation to the non-discrimination principle of women was not raised. Therefore the outcome of the case was that a religion was being protected not a woman!” In a later case, in 2005, the Danish Supreme Court held that employers may prohibit Muslim headscarves if it is in the framework of a general dress code which is part of the company’s external presentation and is enforced consistently towards all employees in similar positions. The German Federal Labour Court held, in 2003, that a department store was not entitled to dismiss an employee who worked at the cosmetics counter because she insisted on wearing a headscarf.

5. Homosexuality

The approach of constitutional courts in the U.K., U.S., and Ireland to homosexuality was initially based on acceptance of religious abhorrence and criminal prohibition. From the time of the infamous trial of Oscar Wilde and up until 1980s, the courts did not insist on the right of homosexual partners to privacy, equality and human dignity. It was only some considerable time after the European Court of Human Rights had taken a clear stand on this human rights issue in 1981, in *Dudgeon v. United Kingdom*, that constitutional systems followed suit. These developments regarding the human rights of homosexuals place the transition from religious edict to human rights.

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rights pluralism in sharp focus and indicate the central part played by international human rights law in the process.

Despite the holding in the *Dudgeon* case, in 1983, the Supreme Court of Ireland upheld the prohibition of homosexual conduct. The Court based its decision explicitly on the Christian character of the state and Justice O’Higgins said:

> From the earliest days, organized religion regarded homosexual conduct, such as sodomy and associated acts, with deep revulsion as being contrary to the order of nature, a perversion of the biological functions of the sexual organs and an affront to both society and God. With the advent of Christianity this view found clear expression in the teachings of St Paul. 62

The Court held that the decision of the European Court of Human Rights, which had decided in the *Dudgeon* case that the Irish legislation violated Article 8 of the European Convention of Human Rights, was not binding law in Ireland. In 1986, the U.S. Supreme Court too held, in the 1986 *Bowers* judgment, 63 that homosexuality was contrary to public morals and upheld criminal prohibitions of consensual sexual intercourse between adults of the same sex.

It took 12 years after *Dudgeon*, before homosexuality was decriminalized in both Ireland and the U.S. In Ireland, homosexuality was formally decriminalized in 1993. In 1998, in *Lawrence v. Texas*, 64 the U.S. Supreme Court reversed its *Bowers* decision, with Justice Kennedy saying: “The statutes seek to control a personal relationship that is within the liberty of persons to choose without being punished as criminals …. [The nation] has been shaped by religious beliefs, conceptions of right and acceptable behaviour, and respect for the traditional family.” He relied in part on the fact that laws prescribing this sort of conduct are invalid under the European Convention of Human Rights. In 1998, the Constitutional Court of South Africa, acting on the Equality Clause of South Africa’s 1996 constitution—the first constitution ever to include sexual orientation in its anti-discrimination provisions—unanimously

overturned “sodomy laws” in the country.\textsuperscript{65} In a sweeping decision, it held that laws criminalizing consensual homosexual conduct violated not only privacy protections but the principles of equality and dignity. In eloquent language, both the majority opinion and a concurrent opinion affirmed that respecting gay and lesbian equality and dignity was a key aspect of overcoming South Africa’s repressive past.

C. International Adjudication

Cases on the difficult encounter between religion or culture and human rights can be brought before international tribunals or committees after the exhaustion of domestic remedies, and, hence, are brought in the wake of decisions by domestic courts. On the issue of patriarchal regulation of membership and property by traditionalist tribes, in contrast with the Supreme Courts of Canada and the U.S., the Human Rights Committee was very clear that minority tribal discrimination against women was an unjustifiable denial of women’s right to equality. On the issue of homosexuality both the European Court of Human Rights and the Human Rights Committee took a clear and unequivocal view in favor of the right of homosexuals to privacy, while constitutional courts in the U.S. and Ireland were still upholding criminal prohibitions. At the level of international tribunals, it is worthy of note that in all the cases, human rights and gender equality were preferred in the result, and the religious and cultural defenses were rejected.

Patriarchal regulation of membership and nationality has been struck down on more than one occasion by the Human Rights Committee. In 1977, Sandra Lovelace submitted a communication to the U.N. Human Rights Committee contesting the application to her of the decision by the Canadian Supreme Court regarding \textit{Lavell}\textsuperscript{66} and challenging her loss of Indian status as the result of marrying a non-Indian. The Human Rights Committee held the Indian Act unreasonably deprived Sandra Lovelace of her right to belong to the Indian minority and to live on the Indian reserve.\textsuperscript{67} This was an unjustifiable denial of her right to enjoy her culture under article 27 of the

\textsuperscript{65} National Coalition for Gay and Lesbian Equality v. Minister of Justice 1998 BCLR 726 (CC).
\textsuperscript{66} \textit{Canada v. Lavell}, supra note 9.
In an individual opinion, Nejib Bouziri added that the Indian Act also breached Article 2 of the ICCPR in that it discriminated between men and women. In 1981, the Human Rights Committee considered a communication in which a Mauritian woman alleged Mauritius immigration law discriminated against women in violation of Articles 2(1) and 3 of the ICCPR. The government of Mauritius had adopted an immigration law providing that if a Mauritian woman married a man from another country, the husband must apply for residence and permission may be refused. If, however, a Mauritian man married a foreign woman, the foreign woman was automatically entitled to residence. The Human Rights Committee held that Mauritius had violated the covenant by discriminating between men and women without adequate justification.

Regarding divorce rights, the European Commission of Human Rights has favored an interpretive approach which will secure women’s right to a get. In this the Commission followed the approach of the French Court of Appeals and is consonant with the later decision of the Canadian Supreme Court discussed above. In 1983, the Commission rejected the complaint of a devout member of the Jewish faith against an order of the French Court of Appeals to pay damages to his former wife for his refusal, subsequent to their civil divorce, to provide a get to complete the religious divorce. The husband claimed that the order to pay damages infringed his freedom of conscience and religion under Article 9 of the European Convention of Human Rights. The Commission held that there was no infringement of Article 9. The argument used by the Commission was that the refusal to hand over the letter of repudiation was not a manifestation of religious observance or practice. In so

68 ICCPR, supra note 3, art. 27.
71 The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222, 230 [hereinafter ECHR], provides (similarly to the provisions of the ICCPR, supra note 3):

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.
deciding, the commission accepted the holding of the French Court of Appeals that “under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife.”

There have been a number of international decisions about restrictions on the wearing of Moslem headscarves at Universities. It should be noted that the discussion in these cases related to women students and not to girls at school and hence it is to be expected that greater emphasis is placed on the women’s right to make an autonomous choice. Nevertheless, none of the decisions regarded restrictions on the headscarf at Universities as a per se violation of the freedom to manifest one’s religion. The decisions were highly contextualized, depending on the political motivation behind the banning of headscarves. In 1993, the European Commission of Human Rights upheld the decisions of the Turkish courts regarding the prohibition of the wearing of Muslim head scarves on university campuses.

The Commission takes the view that by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestations of observance and symbols of that religion without restriction as to place and manner may constitute pressure on students who do not practice that religion or those who adhere to another religion.

In 2005, the European Court of Human Rights took the same view, adding that it was the principle of secularism which was the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where

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72 The decision regarding the norms of Jewish law is clearly based on secular logic and not on religious edict. See Frances Raday, Incorporation of Religious Patriarchy in a Modern State, in FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES 209-25 (Barbara Stark ed., 1992).
74 Id. at 108.
the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should consider it contrary to such values to allow religious attire, including, as in the case before the Court, the Islamic headscarf, to be worn on university premises. In Şahin v. Turkey, the European Court observed that it was aware of the attempts of extremist political movements in Turkey to enforce on the society religious symbols as well as the basic concept of a religious society founded upon religious precepts. In a similar case in Uzbekistan, the Human Rights Committee found a violation:

In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

In an individual opinion, Ruth Wedgwood remarked:

a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student’s face would present a different set of facts. The uncertain state of the record in this case does not provide the basis for adequate consideration of the issue, or even for a *sui generis* finding of violation.

From the 1981 *Dudgeon* case till the 2003 *Young* case, the European Court of Human Rights and the U.N. Human Rights Committee have consistently invalidated sodomy laws or other measures which discriminate against gays and upheld the rights of homosexuals and of transexuals. In this matter, it can clearly be seen that

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76 *Id.*


78 *Id.* in the individual opinion of the committee member, Ms. Ruth Wedgwood.
the international jurisprudence led the way for constitutional courts to follow. In *Dudgeon*, Norris, and Modinos, the European Court held that “sodomy laws” in the U.K., Ireland, and Cyprus, respectively, violated the right to privacy, noting “the detrimental effects which the very existence of the law can have on the life of a person of homosexual orientation.” The Court also applied this principle with regard to granting of child custody to a gay father and admission of homosexuals to the military. The U.N. Human Rights Committee, in *Toonen v. Australia*, 1994, held that laws criminalizing consensual homosexual conduct violate protections for privacy (Article 17) and against discrimination (Articles 2 and 26) in the ICCPR. In particular, it held that the anti-discrimination provisions in the covenant should be understood to include sexual orientation as a protected status. In its first decision affirming the partnership rights of same-sex couples, the U.N. Human Rights Committee held that Australia, in denying pension rights to the surviving same-sex partner of a war veteran, violated discrimination protections in Article 26 of the ICCPR.

### III. Translation from the International to the Constitutional

The regulation and adjudication of the religion cases at the international and constitutional level gives an insight into the potential for international human rights law to influence constitutional law. The international human rights machinery has undoubtedly taken the lead on the primacy of the right of women to equality in the face of religious norms which are patriarchal by entrenching this in express treaty provisions. The international human rights system has created a hierarchy in which the claim of the right to manifest one’s religion or enjoy one’s culture does not trump

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79 *Dudgeon v. United Kingdom*, supra note 61.
82 *Dudgeon v. United Kingdom*, supra note 61, at ¶ 60; *Norris v. Ireland*, supra note 80, at ¶ 46.
the human rights of members of the culture or religion or of others, outside the religion or culture.

Application of this hierarchy of rights has laid the foundations for international human rights institutions to take the lead on concrete issues. International courts have secured women’s rights to equal tribal membership benefits and equal nationality when most constitutional courts were not prepared to do so. International adjudication has guaranteed homosexuals rights to privacy and equality in the face of prohibitions and discrimination based on religious homophobia, while constitutional courts were still dragging their feet on this issue. The impact of the international adjudication was to bring about amendments in the state legislation. On other issues, international adjudication has given support to constitutional courts which were attempting to secure women’s rights in the context of state restraint of patriarchal religious norms which discriminate against women: i.e., divorce and the headscarf.

At the level of international tribunals, analysis of so few cases cannot be used to produce a principle; anecdotally, however, it is worthy of note that in all the cases, human rights and gender equality were preferred in the result, and the religious and cultural defenses were rejected. Furthermore, it is notable that in contrast with the Supreme Courts of Canada and the U.S., the Human Rights Committee was very clear that minority tribal discrimination against women was an unjustifiable denial of women’s right to equality; and contrary to the Irish Supreme Court, the European Court of Human Rights was convinced that prohibition of sodomy was a violation of the rights of homosexuals to privacy.

This result confirms Yuval Shany’s view that “IHR treaties have the potential to enrich domestic law since they often represent more progressive and enlightened approaches to human rights protection than constitutional instruments, sometimes drafted many decades or even centuries ago.”86 However, in the case of the clash with traditionalist cultures and orthodox religions the difference cannot be attributed only to the chronological development of the two sources but rather to the intensity of the pressure brought to bear on the decision-making bodies. Although the normative authority both of international institutions and of constitutional authorities resides in states, there may be a difference in the process of state authorization which gives

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greater independence to the international than to the constitutional framework for the task of according human rights priority over contesting ideologies.

Constitutional courts in different countries having apparently similar religious or cultural rules have sometimes decided in contrary ways or their decisions may have been effective in one context and failed in another. The secular nature of the state seems to be a constantly relevant factor. The handling of religious issues within the majority religious community by the Turkish, Israeli, and Indian courts demonstrates this. In Turkey, in the head scarves decision, the Court relied heavily on the secular character of Turkey since the time of Ataturk to insist on the right of women to equality. In the Sarla Mudgal case in India, the Court used the rhetoric of secular nationhood to justify its rejection of polygamy for Hindu converts. In contrast in Israel, the Court has refused to intervene where the state has given jurisdiction to the religious courts, and it has intervened only in those areas of the law that are governed by secular civil law, such as matrimonial property and, in a very limited, ambivalent way, prayer at the Kotel.

There is another theme that appears to be constant. It is that decisions in which constitutional courts have ruled against the popular sentiment of a religious majority or large minority, without the backing of the government, are rare and, when they do occur, are usually ineffectual. This has occurred in Egypt, India, and Israel. In most of these situations, the constitutional courts’ victories seem to have been short-lived and other state authorities have reversed the gender equality gains. From these observations, it seems that, although constitutional courts may have been no more circumspect on religious than cultural issues, their decisions have been more vulnerable to popular opposition aroused on a religious basis. In such circumstances, without strong governmental support, the constitutional courts have generally not prevailed in their championing of gender equality.

There seems to be little question of the potential usefulness of translation from the international human rights level of definition and adjudication to the constitutional as a method of enhancing the rights to equality and freedom of expression in the face of religious or cultural patriarchy, xenophobia and coercion. Detached from the

87 Supra note 27.
88 The Court’s reliance on secular civil authority for intervention was made clear in Bavli v. Rabbinical Court of Appeals, supra note 42) and in HCJ 153/87 Shakdiel v. The Minister of Religions [1988] IsrSC 42(2) 221.
immediate political pressures within the state, international adjudicators can carry out the analysis of rights on the basis of a hierarchy which modifies the right to freedom of religious manifestation in favor of equality and freedom of expression. The source of the rulings in international forums may have the advantage of exerting global or regional pressure on an individual state. The claim of Western imperialism of the human rights regime must surely recede as the international scene is controlled by a multi-regional and multi-cultural/multi-religious state and individual bureaucracy. Sitting on the CEDAW Committee which functioned on an informal regional basis, I was astonished by the cross-culture and cross-religion consensus on human rights issues both amongst the experts and the amongst the NGO representatives from the entire globe.

This direction of translation from the international to the national level is the opposite flow from that described by J.H.H. Weiler and Neil Walker in their, separate, examinations of the process of translating from the constitutional to the regional. According to my study of religion and human rights, the enlightenment flows from the international to the national. The question is how effective can this translation of human rights interpretation be? The answer to this lies on four levels:

First is the level of state obligation. It could be argued that states may be just as adept at avoiding international obligations as at not assuming internal legal obligations. If this were true then the international level would not have any advantage in developing standards for states. As regards the assumption of international obligations, states do indeed have the right not to enter into a treaty obligation and, even if they do so, they then have the right to make reservations to it. However, none of these powers create a firewall: States will continue to be subject to human rights obligations that are considered part of the customary law and their reservations will be ineffectual if they undermine the very essence of the treaty obligation. It could also be argued that states may easily withdraw from treaty obligations and hence such obligations have no real force. However, withdrawal from treaty obligations is not necessarily easier than repealing laws, amending constitutions or reversing judicial decisions: constitutions

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may be revised even if through a cumbersome process or constitutional court rulings may, as in Canada, be overridden.

Second, it may be argued that international law standards have a problem of enforcement deficiency. There are barriers to the enforcement of international human rights rulings in national legal systems. On a formal level, there is the refusal of dualist systems to integrate international standards directly. Yuval Shany in his examination of the incorporation of IHL obligations in common law systems concludes that there is a failure to satisfactorily incorporate. Beyond that, even in Monist systems, there is evidence that the direct integration may be mere lip-service to be ignored by the courts and the executive, depending on the local courts’ commitment to investigating the international law and taking it seriously. However, there is some evidence of some states conforming to human rights standards. This is clearly the case with regard to some of the issues of religion and law discussed above. Thus, there is a potential for enforcing human rights standards but methods of incentive and deterrence must be developed in order to ensure wider application.

Third, this leads us to the need to disseminate and bring about the internalization of international human rights norms. I would argue that there is considerable value in disseminating knowledge of the rhetoric and definition of IHR refusal to accord deference to orthodox religious and traditional cultural norms or to grant them privilege from the requirement of respecting the right to equality and freedom of conscience and expression of all individuals and groups. It is to be hoped that this currency will eventually achieve acceptance in national jurisdictions. In this, the example of the human rights jurisprudence of the European Court of Justice may be benign—as Weiler has said “like Topsy it just growed.” One of the more effective ways to promulgate international standards is through dissemination of the theory of justice which underlies them.

90 Shany, supra note 86, at 373.
92 Thus the Concord Center for Integration of International Law in Israel, at the College of Management Academic Studies, established an amicus clinic which is intended to promote this process—we submit carefully researched international law opinions to courts sitting on human rights issues.
IV. Theoretical Justification for a Hierarchy of Rights vis-à-vis Multiculturalist Concerns

A number of theories of justice have been advanced in support of deference to cultural or religious values. These theories question the universality of the human rights paradigm. The “multiculturalist” approach contends that preservation of a community’s autonomy is a sufficiently important value to override human rights claims. The “consensus” approach, argues that if cultural or religious values have the sanction of political consensus in a democratic system, then this is enough to legitimize their hegemony. These accounts in fact preserve orthodox religious and traditionalist cultural hegemony. They provide human right guarantees for the religious or cultural community and may thus deprive the disenfranchised sub-groups or individuals within illiberal communities of the rights to religious or cultural dissent, endowed by guarantees of equality and freedom of expression.

Nevertheless, multiculturalist and consensus philosophers present the clash between the religious and liberal agendas on human rights as symmetrical. On this basis, both Charles Taylor and Paul Horowitz critique the impact of the liberal state on religious subgroups.93 Arguing for a more supportive and accommodating approach toward religious belief and practices, they claim that liberalism is not value-neutral—it is a “fighting creed”: “At the very least, liberalism’s focus on the autonomous individual and on the maximisation of individual concepts of the good tends to give it in practice an emphasis on freedom over tradition, will over obligation, and individual over community.”94 The impression given is of symmetry between religious and liberal values. However, in the case of an irresolvable clash of values, the outcome of symmetry would, logically, be stalemate and not, as suggested by Taylor and Horowitz, justification for accommodation and support for religious values that otherwise clash with human rights.

Furthermore, there are good grounds for rejecting the symmetry thesis. There is no symmetry between religious and liberal human rights values. Inverting Taylor’s and Horowitz’s critique of liberalism, you find the values of tradition over

93 CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 249 (1995); Paul Horwitz, The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond, 54 U. TORONTO FAC. L. REV. 1, 14 (1996).
94 Horwitz, supra note 93, at 141. TAYLOR, supra note 93, at 14.
freedom, obligation over will, and community over individual. While liberal values leave space for the religious individual and, to a considerable extent, the religious community, religious values do not recognize the entitlement of the liberal individual or community. There is no symmetry between the normative dominance of liberal values (freedom, will, individual) and the normative dominance of religious values (tradition, obligation, community) because the latter does not even acknowledge the private space of the dissident, the heretic, or the silenced voice within its jurisdiction. These values are primarily tools for the perpetuation of existing power hierarchies. The claim for symmetry is, therefore, based on tolerance of inequality and lack of liberty for those deprived of a voice within the religious community. This is a flawed basis for communitarian theory.

There is a flaw, as well, in the reasoning that calls for the autonomy of communities, where that autonomy denies or reduces the right of some to equality and liberty, since the basis for the community’s claim to autonomy rests on these very norms of equality and liberty. Autonomy demands by minority communities have been organized in a useful typology by Jack Levy. Under that typology, Levy describes various minority claims for external rules limiting the freedom of non-members and for internal rules limiting the freedom of members, all in order to protect an endangered culture or cultural practice. However, were such rules used to defeat equality claims, they would use the value of liberty to defeat liberty and of equality to defeat equality. This analysis can be used regarding majority communities as well as minorities, since the very existence of an equality claim—by secularists in a religious environment, modernists in a traditionalist culture, or women in a patriarchal society—would show a lack of the kind of homogeneity that might have justified deference to an non-egalitarian cultural or religious hegemony over the right to equality and freedom of conscience. Martha Nussbaum has documented the widespread existence of dissent among women in traditionalist cultures or religious communities in her outstanding

96 Levy establishes a useful typology for the rights claims of subgroups, identifying a range of claims, such as immunity from unfairly burdensome laws; Assistance; Self-Government; External rules limiting freedom of non-members; Internal rules limiting the freedom of members; Recognition and enforcement of autonomous legal practices; Guaranteed representation in government bodies; and Symbolic Claims. Levy, supra note 2.
work on women and culture. The presence of such dissent is also palpable in the shadow reports of NGOs from the countries reporting to CEDAW, which present the claims of women who seek to have the equality principles of the convention applied in full. This dissent requires the application of human rights standards to orthodox religions and traditionalist cultures in order that full expression be given to the human rights of the group as it really is and not as it is hegemonically represented in the voice of its traditionalist leadership.

The premise to be derived from an analysis of the divide between the cultural and the religious versus equality and human rights is that, in constitutional societies, equality and liberty should be the governing norms—the Grundnorm on which the whole system rests, including the right to enjoy one’s culture and religion. Constitutional democracy cannot tolerate enclaves of illiberalism whose inhabitants are deprived of access to human rights guarantees.

Even if we reject the arguments of multiculturalism and consensus as justifying the imposition on individuals of non-egalitarian cultural or religious norms, this will not invalidate direct individual consent to those norms. The autonomy of the individual is the ultimate source of legitimacy. It seems clear that a genuine choice to accept certain cultural practices or religious norms should be accepted as valid even if they are to the disadvantage of the acceptor. This liberty to choose is an essential part of the freedom of religion and of the right to equal autonomy of the individual. The need to recognize the autonomy of the individual is a practical as well as a theoretical matter because, in situations of genuine consent, there will be no complaint emanating from those disadvantaged by the illiberal community or much opportunity to intervene. However, recognition of individual consent to systemic disadvantage is problematic. Consent cannot be assumed from silence, since subjection to communitarian authority inherently reduces the capacity for public dissent. Thus, consent is suspect, and it is incumbent on the state to increase the possibility of and to verify the existence of genuine consent by a variety of methods—both a priori educational and economic measures of empowerment and ex posteriori rights of compensation and exit.

There are two different ways in which members of traditionalist cultural or religious communities may seek equality: one is the attempt to ensure egalitarian alternatives outside the community and the other is the attempt to achieve equal personhood within the community. The former can be accommodated by providing a right of exit. The latter is a more holistic claim, is more far-reaching, and a state response to the claim carries with it greater potential for intervention in community autonomy.

Equal cultural or religious personhood is the kind of claim made by tribal women, in the United States and Canada, for example, who wished to retain their tribal membership when marrying persons outside the tribe. It is the kind of claim made by the Women of the Wall in their demand to be allowed to pray in the public space, in an active prayer mode, customarily reserved for men. The claim of the women within these groups is absolutely valid—it is an attempt to improve their terms of membership and to bring their communities into line with modern standards of gender equality. However, there is also an apparent anomaly in this claim; on the one hand, it is based on the right to membership, and, on the other, on a rejection of the terms of membership as offered. The claim of women for equality within a traditionalist group may transform the *modus vivendi* of the group in a way that conflicts with the wishes of the majority of members of the group, both men and women. Thus, it seems clear that states should be more reluctant to intervene in religious or cultural groups and, for the most part, should not invalidate the community rule per se. Thus, individual women’s dissent will not necessarily justify state intervention to prohibit the internal norms and practices of traditionalist communities. The justification for intervention should increase with the severity of the discrimination. If the discrimination results in the infringement of human dignity, in violence, or in economic injury, intervention is justified. It may not be so where the discrimination is purely functional or ceremonial. However, even in cases of functional or ceremonial discrimination, there will be situations in which intervention is justified; for instance, where the claim for equality would be consonant with some authoritative internal interpretation of the group norms or, alternately, where a critical mass of women within the group supports the claim for equality. Furthermore, although states should be circumspect in intervening to invalidate functional or ceremonial discrimination, they should be decisive in denying state support, facilities, or subsidies for the discriminatory activities of the traditionalist groups.

In view of the inhibiting factors regarding intervention and prohibition of discriminatory rules within the religion or culture, and the limited efficacy of denying
state facilities or subsidies, the state should fulfill its obligation to provide women with the right to equality by assuring them of a right of exit from the traditionalist community norms that discriminate against them. The claim of women who seek egalitarian alternatives outside the community should be given full recognition and support by the state. In this case, there is no real dilemma. The lack of genuine consent is transparent, and since consent is the only ground on which cultural or religious patriarchy should be deferred to, the predominance of the right to equality is, in this case, patent.⁹⁹

An attempt to reconcile the clash between liberal values and cultural or religious norms, without relying on the priority of the right to equality, was made by Martha Nussbaum. Nussbaum examined and analyzed “anti-universalist conversations” and, although answering many of them effectively, concludes: “Each of these objections has some merit. Many universal conceptions of the human being have been insular in an arrogant way and neglectful of differences among cultures and ways of life.”¹⁰⁰ Accordingly, she adopts the “capabilities approach” of Amartya Sen to provide “political principles that can underlie national constitutions” in a way specific to the requirements of the citizens of each nation.¹⁰¹ Nussbaum’s sensitivity to cultural diversity is extremely important. There can be no denying that traditionalist cultural and religious ways of life have been an important source of social cohesion and individual solace for many people. There is also no doubt that, in the foreseeable future, these traditions are not going to disappear. Hence, on both an ideological and a pragmatic basis, efforts to achieve human rights should work, as far as possible, within the constraints of the traditionalist or religious culture as well as outside them.


The remedy of “exit”—the right of women to leave a religious order—is crucial, but it will not be sufficient when girls have been taught in such a way as to be unable to scrutinize the practices with which they have grown up. People’s “preferences”—itself an ambiguous term—need not be respected when they are adaptive to unjust background conditions; in such circumstances it is not even clear whether the relevant preferences are authentically “theirs.”

¹⁰⁰ NUSBAUM, supra note 41, at 9.

¹⁰¹ Id. at 105.
However, although Nussbaum’s approach rightly emphasizes the need for sensitivity to cultural and religious differences, the solution that she provides for the dilemma of the struggle between liberal values and cultural or religious norms, in fact, takes us back to the dominance of human rights over religious norms. She proposes a universally applicable model for dealing with the religious dilemma: “The state and its agents may impose a substantial burden on religion only when it can show a compelling interest. But ... protection of the central capabilities of citizens should always be understood to ground a compelling state interest.”

This required protection of central capabilities extends to those functions particularly crucial to humans as dignified free beings who shape their own lives in co-operation and reciprocity with others. Nussbaum’s list of central human functional capabilities includes many of the capabilities denied women, inferior castes and homosexuals by traditionalist cultures and religious norms: e.g., the right to hold property or seek employment on an equal basis with others; to participate effectively in political choices; to move freely from place to place; to have one’s bodily boundaries treated as sovereign; to be secure against sexual abuse; to have, in Nussbaum’s formulation, the social bases of self-respect and non-humiliation; and to be treated as a dignified being whose worth is equal to that of others, which, as she adds, “entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.” For legal or constitutional purposes, this all translates with some ease into the language of human rights protected under the U.N. treaties; indeed, as a constitutional matter, the way to give substance to the Nussbaum/Sen capabilities approach is to guarantee them through rights, whether political and civil or economic and social rights. Nussbaum herself acknowledges the closeness of the connection between the two and the importance of rights per se.

I would agree with Nussbaum’s emphasis on the need for sensitivity to cultural and religious differences, but I would also contend that the role of constitutional law is to give expression to the bottom line of her argument, according to which “[w]e should refuse to give deference to religion when its practices harm people in the areas covered by the major capabilities.”

There is a difference of emphasis in this approach from Susan Moller Okin’s position that:

102 Id. at 202.
103 NUSSBAUM, supra note 41, at 79.
104 Id. at 96-101.
105 Id. at 192.
no argument [should] be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed they might be better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women.106

In my view, there is an argument to be made-on the basis of freedom-that some female members of a traditionalist culture may have an interest in its preservation. That is the reason why, as Okin adds, the preferable course is to encourage the reform of cultures and religions in order to accord equality to women who wish to live within them. It is in the event of failure of this course of action-to achieve equal personhood for women within a culture or religion-that the best the state can offer is a right of exit to those who want it.

Thus, I would translate the Nussbaum/Sen ethical requirement—that basic capabilities must be secured for all members of society—into the language of human rights. This is the language relevant to constitutional law. In translating basic capabilities into rights, there is, to be sure, a need to preserve the sensitivity to cultural diversity engrained in the ethical formulation. However, this cannot be at the cost of the sub-group or the individual right to choose equality. The guarantee of the right to equality is a first-order preference (which is also the case in the Nussbaum formulation). The way in which constitutional principles can incorporate sensitivity to cultural and religious difference is not in the formulation of the right but in tolerance regarding the ways of its implementation. The way of implementation can be regarded as a second-order preference.

V. Conclusion

The legal regime of human rights entitles individuals and groups to claim equality and liberty as against the state and as against social and political institutions. It enables

plurality of belief and religion and abolishes inequalities of status under the law. It entitles individuals and groups to legal protection against the hegemony of the political majority, of the religious establishment and of other powerful social actors.

In the 20th century the international community gave its approval to the universality of the human rights regime. States have almost universally adopted the normative paradigm at the international level, where they are also beneficiaries of inclusion under its pluralistic mantle. There are global and regional pressures or incentives which have induced states of different political, ideological and religious identities to join the international human rights community and remain within the fold. Thus the human rights regime is conceptually well established at the international level.

Within states, it is at the constitutional level that the supremacy of human rights is translated into a normative paradigm. However, within states there may be opposition to the human rights regime—pragmatic or ideological—from powerful lobbies: majoritarian or sectoral. Religious lobbies are an example of strong and well organized ideological opposition. This opposition may result in lack of political will to apply or enforce human rights through constitutional mechanisms and in a dissonance between the international and constitutional level.

The regulation of the clash of traditionalist religion and culture with human rights at the international and constitutional levels demonstrates that the formulation of the human rights vision at the international level consistently underwrites the human rights of individuals and groups as against the power of traditionalist religious or cultural norms. It is at the international level that the common denominator of human rights is at is most assertive. At the international level decision making is by a pluralistic voice of nations and the conflicting ideological lobbies have less political power. Thus the international level has the potential to develop a normative paradigm which not all constitutional systems have the power and independence to achieve. The future of human rights as a universal paradigm depends on the effectiveness with which international norms can be translated to the constitutional level.